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A LEGAL VIEW OF RACIAL DISCRIMINATION.

I.

FEDERAL AMENDMENTS INHIBITING STATE DISCRIMINATION.

The Thirteenth, the Fourteenth and the Fifteenth Amendments of the Federal Constitution, *propria vigore*, incorporate the colored race into the body of citizenship, with equal rights and immunities with other citizens. The Thirteenth (proclaimed December 18, 1865) declares:

SECTION 1. Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

SEC. 2. Congress shall have power to enforce this Article by appropriate legislation.

Section 1 of the Fourteenth is:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

This Amendment was proclaimed July 28, 1868: its Fifth Section is verbally the same as the Second of the Thirteenth Amendment.

The Fifteenth (proclaimed March 30, 1870) declares:

SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or any State on account of race, color or previous condition of servitude.

The Second Section is verbally the same as that of the the Thirteenth Amendment: *supra.*

Under these Amendments, it is evident that to exclude colored people from places of public resort on account of their race, is an illegal discrimination. Such discrimination is to fix upon them the brand of inferiority, and tends to fix their position as a servile and dependent people. It is, of course, impossible to enforce equality by law. But the law simply insures to colored citizens the right to admission, on equal terms with others, to public resorts and to equal enjoyment of privileges of a *quasi* public character.

Before the abolition of slavery, the colored race in the slave-holding States were not citizens, and their position and the law applicable thereto has no place in this discussion, and will, therefore, be passed without comment.

II.

THE LAW BEFORE THE AMENDMENTS, IN THE ANTI-SLAVERY STATES.

One of the leading cases was decided in 1850 in Massachusetts (*Roberts* v. *The City of Boston*, 1850, 5 Cush. Mass. 198). It was held that provision could be made for the instruction of colored children, in separate schools established exclusively for them, and their attendance upon the other schools could be prohibited. Chief Justice SHAW delivered the opinion of the Court, and used this remarkable language:

> The great principle advanced by the learned and eloquent advocate of the plaintiff [Charles Sumner] is, that by the Constitution and laws of Massachusetts, all persons, without distinction of age or sex, birth or color, origin or condition, are equal before the law. This, as a broad general principle, such as ought to appear in a declaration of rights, is perfectly sound; it is not only expressed in terms, but pervades and animates the whole spirit of our Constitution of free government. But, when this great principle comes to be applied to the actual and varied conditions of persons in society, it will not warrant the assertion, that men and women are legally clothed with the same civil and political powers, and that children and adults are legally to have the same functions and be subject to the same treatment; but only that the rights of all, as they are settled and regulated by law, are equally entitled to the paternal consideration

and protection of the law, for their maintenance and security. What these rights are, to which individuals, in the infinite variety of circumstances by which they are surrounded in society, are entitled, must depend on laws adapted to their respective relations and conditions.

Notwithstanding this statement of the doctrine, the learned Judge admitted that colored people, the descendants of Africans, are entitled by law, in Massachusetts, to equal rights, constitutional and political, civil and social, with those accorded the white people. To the question, that the maintenance of separate schools tends to deepen and perpetuate the odious distinction of caste, founded in a deep-rooted prejudice in public opinion, the Court says that, if such prejudice exists, it is not created by law, and probably cannot be changed by law; that separate schools could legally be provided for colored children. The opinions in accord with this decision, since the Federal Amendments, are upon entirely different grounds, as will be seen further on in this discussion.

Another leading case was decided in Michigan (*Day* v. *Owen*, 1858, 5 Mich. 520), which makes the negro inferior in social standing, and denies him the rights accorded to the white man. It was held lawful to exclude a colored person from the cabin on a boat. This was a rule adopted and published by an owner of a boat. The Court held that the reasonableness of the rule does not depend upon the color of the passenger, or on the class of persons to which he belongs, all of whom are alike excluded, but on the effect the carrying of such persons in the cabin would have, not on the owner's business as a carrier, but on the accommodation of the mass of persons who have a right, and are in the habit of traveling on the boat. As the duty to carry is imposed by law for the convenience of the community at large, and not of individuals, except so far as they are a corporate part of the community, the law would defeat its own object if it required the carrier, for the accommodation of particular individuals, to incommode the community at large. It was held that the law did not require the owner of the boat to make any rules, but if he deemed it for his interest to do so,

looking to an increase of passengers from the superior accommodations he held out to the public, to deny him the right would be an interference with a carrier's control over his own property in his own way, not necessary to the performance of his duty to the public as a carrier. Hence, it was said that a carrier could make a rule, excluding colored persons from the cabin of his boat.

These two decisions are a fair exposition ot the law in the Northern States before the adoption of the Federal Amendments named in this article.

III.

THE LAW AFTER THE AMENDMENTS.

Under these Amendments, the States can make no discrimination as to their citizens.

In 1866 Congress passed the "Civil Rights Bill" (14 Stat. at Large, ch. 31, page 27), and re-enacted with some modifications in Sections 16, 17, and 18, of the Enforcement Act, passed May 31, 1870 (16 Stat. at Large, ch. 114, page 140). The "Civil Rights Bill" of 1866, was enacted in view of the Thirteenth Amendment, before the Fourteenth was adopted, and to wipe out the burdens and disabilities, the necessary incidents of slavery, constituting its substance and visible form; and to secure to all citizens of every race and color, and without regard to previous servitude, these fundamental rights which are the essence of civil freedom, namely: the same right to make and enforce contracts, to sue, to be parties, to give evidence, and to inherit, purchase, lease, sell and convey property, as is enjoyed by white citizens. Congress did not, at that time, under the authority given by the Thirteenth Amendment, adjust the social rights of any race of men in the community. Congress assumed to declare and indicate those fundamental rights which appertain to the essence of citizenship, and the enjoyment or deprivation of which constitutes the essential distinction between freedom and slavery. The Thirteenth Amendment abolished slavery; the Fourteenth prohibited the States from abridging the privileges or immunities of

citizens of the United States, from depriving them of life, liberty, or property without due process of law, and from denying to any the equal protection of the law: *Civil Rights Cases* (1883), 109 U. S. 3.

Sections 1 and 2 of the Civil Rights Act of March 1, 1875 (18 Stat. at Large, ch. 114, page 335) are as follows:

Be it enacted, &c., That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.

SEC. 2. That any person who shall violate the foregoing section by denying to any citizen, except for reasons by law applicable to citizens of every race and color, and regardless of any previous condition of servitude, the full enjoyment of any of the accommodations, advantages, facilities, or privileges in said section enumerated, or by aiding or inciting such denial, shall for every such offence forfeit and pay the sum of five hundred dollars to the person aggrieved thereby, to be recovered in an action of debt, with full costs; and shall also, for every such offence, be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than five hundred nor more than one thousand dollars, or shall be imprisoned not less than thirty days nor more than one year: *Provided*, That all persons may elect to sue for the penalty aforesaid, or to proceed under their rights at common law and by State Statutes; and having so elected to proceed in the one mode or the other, their rights to proceed in the other jurisdiction shall be barred. But this provision shall not apply to criminal proceedings, either under this act or the criminal law of any State: *And provided further*, That a judgment for the penalty in favor of the party aggrieved, or a judgment upon an indictment, shall be a bar to either prosecution respectively.

This law was held to be unconstitutional, because it declares, without any reference to adverse State legislation on the subject, that all persons shall be entitled to equal accommodations and privileges of inns, public conveyances, and places of public amusement, and imposes a penalty upon any individual who shall deny to any citizen such equal accommodations and privileges. This is not corrective legislation, such as Congress can make; it is primary and direct; it takes immediate and absolute possession of the subject of the right of admission to inns, public conveyances, and places of amusement. Hence, it is an attempt to supersede

and displace State legislation on the same subject, or only allow it permissive force. It ignores State legislation and assumes that the matter is one that belongs to the domain of Congressional regulation. No such plenary power has been conferred upon Congress by the Fourteenth Amendment. This law is unconstitutional as applied to the several States, as such legislation is not authorized either by the Thirteenth or Fourteenth Amendment. The Fourteenth Amendment is prohibitory upon the States only, and the legislation authorized to be adopted by Congress for enforcing it is not *direct* legislation on the matters respecting which the States are prohibited from making or enforcing certain laws, or doing certain acts, but is *corrective* legislation, such as may be necessary or proper for counteracting and redressing the effect of such laws or acts: *Civil Rights Cases* (1883), 109 U. S. 3.

In these cases, Justice BRADLEY delivered the opinion of the Court. It was not decided whether the law as it stands is operative in the Territories and District of Columbia; the decision only relating to its validity as applied to the States. Nor was it decided whether Congress, under the commercial power, may or may not pass a law securing to all persons equal accommodations on lines of public conveyance between two or more States.

The fourth section of the Civil Rights Act was held to be constitutional:

> SEC. 4. That no citizen, possessing all other qualifications which are or may be prescribed by law, shall be disqualified for service as grand or petit juror in any court of the United States, or of any State, on account of race, color, or previous condition of servitude; and any officer or other person charged with any duty in the selection or summoning of jurors who shall exclude or fail to summon any citizen for the cause aforesaid, shall, on conviction thereof, be deemed guilty of a misdemeanor, and be fined not more than five thousand dollars.

This section was held constitutional, as it was entirely corrective in its character; that disqualifications for service on juries are only created by law, and the first part of the section is aimed at certain disqualifying laws, namely: those

which make mere race or color a disqualification; and the second clause of this section is directed against those who, assuming to use the authority of the State government, carry into effect such a rule of disqualification. Thus, in a Virginia case (*Ex parte Virginia*, 1879, 100 U. S. 339) it was held that an indictment against a State officer under this section, for excluding persons of color from the jury list, is sustainable. The State, through its officer, enforced a rule of disqualification which the law was intended to abrogate and counteract. Whether the statute book of Virginia actually laid down any such rule of disqualification or not, the State, through its officer, enforced such a rule, and it is against such State action, through its officers and agents, that the last clause of Section 4 is directed. This divests it of any unconstitutional character, and makes it differ widely from the first and second sections of the same act.

Justice HARLAN dissented from the majority opinion in the *Civil Rights Cases*, in forcible language. He said:

> The opinion in these cases proceeds, it seems to me, upon grounds entirely too narrow and artificial. I cannot resist the conclusion that the substance and spirit of the recent Amendments of the Constitution have been sacrificed by a subtle and ingenious criticism. "It is not the words of the law but the internal sense of it that makes the law; the letter of the the law is the body, the sense and reason of the law is the soul." Constitutional provisions, adopted in the interest of liberty, and for the purpose of securing, through national legislation, if need be, rights inhering in a state of freedom, and belonging to American citizenship, have been so construed as to defeat the ends the people desired to accomplish, which they attempted to accomplish, and which they supposed they had accomplished by changes in their fundamental law. By this I do not mean that the determination of these cases should have been materially controlled by considerations of mere expediency or policy. I mean only, in this form, to express an earnest conviction that the Court has departed from the familiar rule requiring, in the interpretation of constitutional provisions, that full effect be given to the intent with which they were adopted.

He says the Statute of 1875 is for the benefit of citizens of every race and color, and secures and protects rights belonging to the black man as a freeman and citizen; nothing more; that the personal rights and immunities recognized in the prohibitive clause of the Fourteenth Amendment

were, prior to its adoption, under the protection, primarily, of the States, which rights, created by or derived from the United States, have always been, and, in the nature of things, should always be, primarily, under the protection of the General Government. He therefore holds that the law in question is constitutional, and that the rights which Congress, by the Act of 1875, endeavored to secure and protect, are legal, not social rights, and the law is for the benefit of every race and color. Hence, discrimination practiced by corporations and individuals in the exercise of their public or *quasi* public functions is a badge of servitude, the imposition of which Congress may prevent under its power, by appropriate legislation, to enforce the Thirteenth Amendment, and so the Act of 1875 is not repugnant to the Constitution. The theory of the opinion of the majority of the Court, that the General Government cannot, in advance of hostile State laws or hostile State proceedings, actively interfere for the protection of any of the rights, privileges, and immunities secured by the Fourteenth Amendment, Justice HARLAN does not accept. He holds that by necessary implication, there is power in Congress, by legislation, to protect a right derived from the National Constitution; that a prohibition upon a State is not a power in Congress or in the National Government. It is simply a denial of power to the State, and, therefore, the interpretation of the Fourteenth Amendment by the majority of the Court, is not authorized by its language.

IV.

THE COMMON LAW RULE.

The Civil Rights Act seems to have been framed to correspond with the law applicable to innkeepers and common carriers. An innkeeper under the common law is bound to take in all travelers, and to entertain them, if he can accommodate them, for a reasonable compensation. If he improperly refuses to receive or provide for a guest, he is liable to be indicted therefor. And common carriers are no more at liberty to refuse a passenger, if they have sufficient room

and accommodations, than an innkeeper is, to refuse suitable room and accommodations to a guest: Story on Bailments, sects. 475-6. And in *Rex* v. *Ivens* (1835), 7 C. & P. 213; 32 E. C. L. 495, the Court, speaking by Justice COLERIDGE, said:

> An indictment lies against an innkeeper who refuses to receive a guest, he having at the time room in his house, and either the price of the guest's entertainment being tendered to him, or such circumstances occurring as will dispense with that tender. This law is founded in good sense. The innkeeper is not to select his guests. He has no right to say to one, you shall come into my inn, and to another, you shall not, as every one coming and conducting himself in a proper manner has a right to be received; and for this purpose innkeepers are a sort of public servant, they having in return a kind of privilege of entertaining travelers and supplying them with what they want.

Thus the public nature of the innkeeper's employment forbids him from discriminating against any person asking admission as a guest on account of the race or color of that person, provided he has accommodations, and the guest is willing to pay for entertainment.

The negro is now, by the Constitution of the United States, given full citizenship with the white man, and all the rights and privileges of citizenship attend him wherever he goes. Whatever right a white man has in a public place, the black man has also, because of such citizenship.

V.

PRIVATE PLACES.

Private entertainment and private places are not governed, in this respect, like a public place. Thus, a mere private boarding-house is not an inn, nor is its keeper subject to the responsibilities, or entitled to the privileges of a common innkeeper. To constitute one an innkeeper, within the legal force of that term, he must keep a house of entertainment or lodging for all travelers or wayfarers who may choose to accept the same, being of good character or conduct: Redfield on Carriers, sec. 575. The law does not interfere with private entertainments, or prevent persons not engaged in the business of keeping a place of public amusement,

from regulating admission to social, public or private entertainments given by them as they may deem best, nor does it seek to compel social equality: *People* v. *King* (1888), 110 N. Y. 418.

In *Bowline* v. *Lyon et al.* (1885), 67 Iowa 536, the Iowa Supreme Court held that one conducting a private skating rink could exclude a negro; because it did not appear that the rink was operated under a license or privilege granted by the State, or by the City in which it was conducted, or that it was in any manner regulated or governed by the police regulations of the City. Such being the case, it must be presumed to have been conducted as a private business merely, and that no person, black or white, had a right to enter against the will of the proprietor of the skating rink. When members of the public entered the building, they did so by permission of the proprietor, or under a contract with him, and there was no reason why the owner of the skating rink might not have limited his invitations to certain individuals or classes. This was so because the business was private. The proprietor had the right, at any time, to withdraw the invitation, either as to the general public or as to particular individuals.

But when the skating rink is a place of public amusement, a different rule prevails. When the place of amusement is licensed by the municipal authorities, and is regulated in the public interest, it is a public place, or *quasi* public, giving the legislature a right to interfere. But it appears that even the owner of a public place of amusement can make a rule excluding all persons of a certain nationality, as all Germans, or all Irishmen, or all Jews, as such a law would be entirely reasonable: *People* v. *King* (1888), 110 N. Y. 418; *United States* v. *Newcomes* (1876), U. S. D. Ct. E. D. Pa., 11 Phila. 519; 22 Int. Rev. Rec. 115.

VI.

INHIBITION OF STATE LEGISLATION.

Where a State has not violated the provisions of the Thirteenth, the Fourteenth, or the Fifteenth Amendment, no

power is conferred on Congress to punish private individuals who, acting without any authority from the State, and it may be in defiance of law, invade the rights of the citizens which are protected by such Amendments. Hence, when an act of Congress is directed exclusively against the action of individuals, and not of the State, the law is broader than the Amendments by which it is attempted to be justified, and is, therefore, unconstitutional. The duty of protecting all its citizens in the enjoyment of an equality of rights, was originally assumed by the States, and it still remains with them. The only obligation resting upon the United States, is to see that the States do not deny the right: *Le Grand* v. *United States* (1882), U. S. C. Ct. E. D. Tex., 12 Fed. Repr. 577; *Smoot* v. *RR. Co.* (1882), U. S. C. Ct. D. Ky., 13 Fed. Repr. 337; *Civil Rights Cases* (1883), 109 U. S. 3. So, where two or more persons conspire to deprive a colored person of the equal protection of the laws, they are liable to the laws of the State where the offense is committed, and cannot be punished under an act of Congress: *Le Grand* v. *United States* (1882), U. S. C. Ct. E. D. Tex., 12 Fed. Repr. 577.

So the following section of the United States laws is unconstitutional (Sec. 5519, Rev. Stat.):

> If two or more persons in any State or Territory conspire or go in disguise, on the highway or on the premises of another, for the purpose of depriving either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; each of said persons shall be punished by a fine of not less than five hundred nor more than five thousand dollars, or by imprisonment with or without hard labor, not less than six months nor more than six years, or by both said fine and imprisonment.

Justice WOODS said that this Section was passed by Congress without any Constitutional warrant; that it was never supposed that under the Fourteenth Amendment Congress could pass a law which would punish any private citizen for an invasion of the rights of his fellow citizen conferred by the State of which both were residents: *Le Grand* v. *United*

States (1882), U. S. C. Ct. E. D. Tex., 12 Fed. Repr. 577 [and *U. S.* v. *Harris* (1883), 16 Otto (106 U. S.) 629, 639, followed in *Baldwin* v. *Franks* (1886) 120 U. S. 678.]

The Thirteenth Amendment does not authorize Congress to pass laws for the punishment of offenses against the colored race, because this duty is for the States: *United States* v. *Cruikshank* (1875), 92 U. S. 542; *Slaughter-house Cases* (1872), 16 Wall. (83 U. S.) 36; *Frasher* v. *State* (1877), 3 Tex. App. 267.

Congress has no power under the Fourteenth Amendment to protect the right to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of theaters, inns, and other public places, against violation by individuals, acting in their private capacity: Charge to the Grand Jury by Judge EMMONS (1875), 2 Am. L. T. Rep. (N. S.) 198, C. Ct. W. D. Tenn.

Justice BRADLEY said in the *Civil Rights Cases* (1883), 109 U. S. 3:

> It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the Amendment. It has a deeper and broader scope. It nullifies and makes void all State legislation, and State action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty or property without due process of law, or which denies to any of them the equal protection of the laws. * * * * It does not invest Congress with power to legislate upon subjects which are within the domain of State legislation; but to provide modes of relief against State legislation, or State action of the kind referred to. It does not authorize Congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of State laws, and the action of State officers, executive or judicial, when these are subversive of the fundamental rights specified in the Amendment.

VII.

PUBLIC PLACES.

As the law now is, all persons within the jurisdiction of a State have a right to the full and equal enjoyment of all accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other public places of amusement; subject only to the conditions

and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude. The several States have enacted laws securing to people of all races equal accommodations in public conveyances and places of public entertainment or amusement. The State laws, or civil rights bills, are substantially the same, and make provisions similar to those included in the Civil Rights Law of Congress, enacted in 1875.

[They will be presented in the LEGAL NOTES of a subsequent number of this magazine.—ED.]

The boundaries of public and of private places seem to merge, so much so that the courts are frequently called upon to award damages to a party whose rights have been invaded. The interpretation of the State law will now be presented.

VII (*a*).

CONCERT HALLS AND THEATERS.

One of the first cases arising under the civil rights law, came up in Mississippi in 1873. The facts of the case are these: A lessee of a public concert hall refused a man of color a seat in a public hall. The lessee was arrested and brought before a justice of the peace, charged on the affidavit of the party aggrieved with having refused to sell him a ticket entitling him to admission to a public show or theatrical performance, given at a public hall, because the affiant was a man of color. The lessee was adjudged guilty of violation of the Act, and the penalty prescribed. The case then went to the State Supreme Court on writ of *habeas corpus*, where the judgment of the lower Court was affirmed. The Court held that there was no constitutional objection to the civil rights law of Mississippi; that the assertion of a right in all persons to be admitted to a theatrical entertainment, and the punishment as an offense of the act of the owner, lessee or manager of a public hall, who denies or refuses to sell a ticket to a person, in no sense appropriates the private property of the lessee, owner or manager, to the public use. Judge SIMRALL, speaking for the Court, said:

Events of such vast magnitude and influence now and hereafter, have gone into history within the last ten years, that the public mind is not yet quite prepared to consider them calmly and dispassionately. To the judiciary, which ought at all times to be calm, deliberate and firm, especially so when the public thought and sentiment are at all excited beyond the normal tone, is committed the high trust of declaring what are rules of conduct and propriety prescribed by the supreme authority, and what are the rights of individuals under them. As to the policy of legislation, the judiciary have nothing to do. That is wisely left to the law-making department of the government. A court only consults the policy of a law, as an aid to attain the legislative meaning and intent.

He said the intent of the law is, that all persons may have equal accommodations in the vehicles of common carriers, at the inns, hotels, theaters and other public places of amusement, upon terms of paying the usual prices therefor, and if any is excluded, it must not be on account of race: *Donnell* v. *State* (1873), 48 Miss. 661.

So in Louisiana, the Supreme Court rendered a decision consonant with that of the Mississippi Court, holding a proprietor of an academy of music liable in damages under the statute, for refusing to admit a colored man into the theater after he had purchased a ticket. Article XIII of the Louisiana (1868) Constitution declares:

All persons shall enjoy equal rights and privileges upon any conveyance of a public character, and all places of business, or of public resort, or for which a license is required by either State, parish, or municipal authority, shall be deemed places of a public character, and shall be open to the accommodation and patronage of all persons, without distinction or discrimination, on account of race or color.

The Court holds that this Article of the State Constitution is not a mere abstraction, but it guarantees substantial rights: *Joseph* v. *Bidwell* (1876), 28 La. Ann. 382.

So it may be laid down as the rule, that a colored man who has purchased a ticket to a public entertainment held in a theater, cannot be refused admission under the law, because he is a colored person: *Baylies* v. *Curry* (1889), 128 Ill. 287.

VII (*b*).

SKATING RINKS.

A public skating rink comes under the same provision of law as other places of public amusement. The law gives

every person certain rights. These rights thus given, include the equal enjoyment of privileges furnished by managers of public skating rinks, and any other place of public amusement. Thus, a State law making it a misdemeanor to exclude citizens of the State from places of amusement by reason of race, color, or previous condition of servitude, is a valid exercise of the police power of the State, and a party can be indicted and convicted of a misdemeanor for excluding a colored man from a public skating rink: *People* v. *King* (1888), 110 N. Y. 418.

But a party conducting a private skating rink can choose his patrons, and may exclude a colored man from his rink. No person, black or white, has a right to enter such private place against the will of the proprietor: *Bowling* v. *Lyon* (1885), 67 Iowa 536.

Judge ANDREWS, in *People* v. *King* (1888), 110 N. Y. 426, says:

> The members of the African race, born or naturalized in this country, are citizens of the States where they reside, and of the United States. Both justice and the public interest concur in a policy which shall elevate them as individuals and relieve them from oppression or degrading discrimination, and which shall encourage and cultivate a spirit which will make them self-respecting, contented and loyal citizens, and give them a fair chance in the struggle of life, weighted, as they are at best, with so many disadvantages. It is evident that to exclude colored people from places of public resort on account of their race, is to fix upon them a brand of inferiority, and tends to fix their position as a servile and dependent people. It is, of course, impossible to enforce equality by law. But the law in question simply insures to colored citizens the right to admission on equal terms with others, to public resorts, and to equal enjoyment of privileges of a *quasi* public character. The law cannot be set aside, because it has no basis in the public interest; and the promotion of the public good is the main purpose for which the police power may be exerted; and whether, in a given case, it shall be exerted or not, the legislature is the sole judge, and a law will not be held invalid because, in the judgment of a court, its enactment was inexpedient or unwise.

This decision conveys the idea that race discrimination as to public entertainments may be prevented under the law of the State, as a police regulation; that is, the police power of the State can enforce a statute to prevent race discrimination in public places.

VII (*c*).

BARBER SHOPS.

So a barber shop is a public place under the law, and the authority of the State to prohibit discrimination on account of color in places of public resort, as a barber shop, is undoubted. The proprietor of such a shop cannot adopt and enforce a regulation which will not apply to white and colored people alike: *Messenger* v. *State* (1889), 25 Neb. 674. The Civil Rights Act of Nebraska names barber shops among public places, and this decision is in accord with the law controlling other public places.

VII (*d*).

RESTAURANT ACCOMMODATIONS.

So a restaurant keeper is guilty of a misdemeanor under the statute who refuses to serve a colored person with refreshments in a certain part of a restaurant, for no other reason than that he is colored. This decision was rendered in Michigan, where there must be, and is, an absolute, unconditional equality of white and colored men before the law. The white man can have no rights or privileges under the law that are denied to the black man. The Court does not recognize the rule adopted in some States, that separate departments may be provided for the colored man, so long as he is given substantially equality as to accommodations. The Court held that:

The negro is now, by the Constitution of the United States, given full citizenship with the white man, and all the rights and privileges of citizenship attend him wherever he goes. Whatever right a white man has in a public place, the black man has also, because of such citizenship.

The law of Michigan declares:

SECTION 1. *The people of the State of Michigan enact*, That all persons within the jurisdiction of said State shall be entitled to the full and equal accommodations, advantages, facilities, and privileges of inns, restaurants, eating houses, barber shops, public conveyances on land and water, theaters, and all other places of public accommodation and amusement, subject only to the conditions and limitations established by law, and applicable alike to all citizens: Pub. Acts, 1885, pp. 131, 132.

The Court holds that under this Statute, no line can be drawn in the streets, public parks or public buildings upon one side of which the black man must stop and stay, while the white man may enjoy the other side, or both sides; nor can such a line of separation be drawn in any of the public places or conveyances mentioned in this act: *Ferguson* v. *Gies*, decided in the Supreme Court of Michigan, October 10, 1890.

In delivering the opinion of the Court, Judge MORSE says:

> The prejudice against association in public places with the negro, which does exist, to some extent, in all communities, less now than formerly, is unworthy of our race; and it is not for the courts to cater to or temporize with a prejudice which is not only not humane, but unreasonable. Nor shall I ever be willing to deny to any man any rights and privileges that belong in law to any other man, simply because the Creator colored him differently from others, or made him less handsome than his fellows—for something he could not help in the first instance, or ever afterward remove by the best of life and human conduct. And I should have but little respect or love for the Deity if I could for one moment admit that the color was designed by Him to be forever a badge of inferiority, which would authorize the human law to drive the colored man from public places, or give him less rights than the white man enjoys. Such is not the true theory of either the Divine or human law to be put in practice in a republican form of government, where the proud boast is that "all men are equal before the law." The man who goes either by himself or with his family to a public place, must expect to meet and mingle with all classes of people. He cannot ask, to suit his caprice or prejudice or social views, that this or that man shall be excluded because he does not wish to associate with them. He may draw his social line as closely as he chooses at home, or in other private places, but he cannot in a public place carry the privacy of his home with him, or ask that people not as good or great as he is, shall step aside when he appears. All citizens who conform to the law have the same rights in such places, without regard to race, color, or condition of birth or wealth.

While this case clearly enunciates the doctrine that separation of the races shall not be allowed in Michigan, yet in *The People ex rel. Workman* v. *The Board of Education of Detroit* (1869), 18 Mich. 400, it was held that separate schools for the education of the blacks and the whites might exist, where the accommodations and advantages of learning were fully equal one with the other, which doctrine is in conflict with that of *Ferguson* v. *Gies*.

VII (*e*).

SEPARATE SCHOOLS.

Where the statute does not forbid separate schools, the weight of authority is that they may be established, provided equal accommodations are furnished for the black children. This is on the principle that the school authorities have the right to discriminate, in the exercise of their discretion, as to the methods of education to be pursued with different classes of pupils, and these authorities have power, in the best interest of education, to cause different races and nationalities, whose requirements are manifestly different, to be educated in separate places. Such establishment of separate institutions for the education and benefit of different races, does not imply the inferiority of any race. The right to the equal protection of the law is not denied by establishing separate schools. It must be remembered that equality under the law does not mean identity of privileges and rights. It is not discrimination between the two races which is prohibited by law, but discrimination against the interests of the colored race: *People ex rel. King &c.* v. *Gallagher* (1883), 93 N. Y. 438; *People ex rel. Dietz* v. *Easton* (1872), 13 Abb. Pr. (N. S.) (N. Y.) 159.

So in Indiana, separate schools can be established for black children. The Court holds that the common school is purely a domestic institution, and subject to the exclusive control of the constituted authorities of the State. The Federal Constitution does not provide for any general system of education to be conducted and controlled by the National Government, nor does it vest in Congress any power to exercise a general or special supervision over the States on the subject of education. Uniformity is secured when all the schools of the same grade have the same system of government and discipline, the same branches of learning taught, and the same qualifications for admission. The classification of scholars, on the basis of race or color, and their education in separate schools involves questions of domestic policy which are within the legislative discretion and con-

trol, and do not amount to an exclusion of either class: *Cory et al.* v. *Carter* (1874), 48 Ind. 327; see also to the same effect, *Dallas* v. *Fosdick* (1869), 40 How. Pr. (N. Y.) 249. And generally this line of cases holds that an act authorizing a classification of children, on the basis of color, does not contravene the Fourteenth Amendment of the Federal Constitution, and that colored children residing in a district for white children, are not, as of right, entitled to admission into schools for white children, when separate schools are established for them: *State ex rel. Garnes* v. *McCann et als.* (1871), 21 Ohio St. 198. Boards of education may classify either schools or scholars, in any manner whatever, for the promotion of the best interests of schools and of education, basing their classification upon age, or sex, or scholarly attainments; or they may classify by color, if in their judgment it becomes necessary or expedient for them to do so. Classification upon color does not abridge any of the privileges or immunities of a colored man as a citizen of the United States, nor deny to him the equal protection of the laws of the State as a citizen: *Ward* v. *Flood* (1874), 48 Cal. 36; *Roberts* v. *The City of Boston* (1850), 5 Cush. (Mass.) 198; *State ex rel. &c.* v. *Cincinnati et als.* (1850), 19 Ohio 178; *Van Camp* v. *Board of Education of the Incorporated Village of Logan* (1859), 9 Ohio St. 406; *People* v. *Board &c. of Detroit* (1869), 18 Mich. 400; *State ex rel. Stoutmeyer* v. *Duffy et. als.* (1872), 7 Nev. 342; *United States* v. *Buntin* (1882), U. S. C. Ct. S. D. Ohio, 10 Fed Repr. 730.

The Kansas Supreme Court says that unless it appears clear beyond all question that the legislature intended to authorize the establishment of separate schools, "we should not hold that any such authority had been given"; that this power of the legislature may be doubted. But unless the legislature has clearly conferred power upon the school boards to establish separate schools for the education of white and colored children, no such power has been conferred: *Board of Education of The City of Ottawa et al.* v. *Tinnon* (1881), 26 Kan. 1. And in Iowa, it is held that a pupil, otherwise qualified, cannot be excluded from the public

schools on account of his color, nor, if colored, can he be compelled to attend a separate school for colored children: *Smith* v. *Directors &c.* (1875), 40 Iowa 518; *Clark* v. *Board &c.* (1868), 24 Iowa 266; *Dove* v. *School Dist.* (1875), 41 Iowa 689.

In Illinois, the school authorities are prohibited from excluding children from the public schools on account of color. A public duty binds such authorities to furnish schools, *not separate schools*, for all children, both white and black: *People* v. *Board* (1889), 127 Ill. 613, and the Constitution makes no distinction in regard to race or color of children who are entitled to share in benefits of the public schools: *People* v. *Board* (1882), 101 Ill. 308, and see dissenting opinion of DANFORTH, J., in *People ex rel. King* v. *Gallagher* (1883), 93 N. Y. 458, which holds that the States have no right to make any discrimination against the colored race, even to the establishing of separate schools for their children; that exclusion of colored children from schools for white children is a discrimination against the colored child not authorized by the Federal Constitution. FINCH, J., concurred in this dissenting opinion.

The conflict on this point of separate schools for colored children, is clear and decided. But the weight of authority clearly establishes the doctrine that it is constitutional to establish separate schools for colored children, provided such schools are substantially the same as those of white children.

Congress has recognized this doctrine, and has established exclusive schools for the education of the colored race, in the District of Columbia. The law provides:

SEC. 282. Any white resident shall be privileged to place his or her child, or ward, at any of the schools provided for the education of white children in said portion of the district he or she may think proper to select, with the consent of the school board; and any colored resident shall have the same rights with respect to colored schools: Rev. Stat. D. C. page 33; Act of June 25, 1864, ch. 156, section 16. See also 12 Stat. at Large, ch. 151, page 537, Act of July 11, 1862; 12 Stat. at Large, ch. 103, page 796, Act of March 3, 1863; 14 Stat. at Large, ch. 217, page 216, Act of July 23, 1866; 17 Stat. at Large, ch. 108, page 619, Act of March 3, 1873.

The Thirty-ninth Congress, which originated and adopted the Fourteenth Amendment, made appropriations and assigned funds for the support of schools in the District of Columbia, established for the education of colored pupils exclusively (14 Stat. at Large, ch. 217, page 216, Act of July 23, 1866).

When a State, by its legislature, passes an act which excludes the negro children of the State from any share of the proceeds of the "Common School Fund," set apart by the Constitution, as well as from the annual tax levied under general laws on the property of white persons for school purposes, and to give them the benefit of only the fund provided for in the special act, the statute is void in this respect, as well as regards the partial and discriminating taxation provided for, as it violates the Fourteenth Amendment of the United States Constitution: *Dawson* v. *Lee* (1884), 83 Ky. 49.

VII (*f*).

RULE AS TO COMMON CARRIERS.

The rule as to common carriers is not entirely uniform. In *Railroad Co.* v. *Brown* (1873), 17 Wall. (84 U. S.) 445, it was decided under a law of Congress giving privileges to a railroad company, that a separate car could not be assigned exclusively to white people and another to the colored. The provision of law was "that no person shall be excluded from the cars on account of color." The company provided two cars but set apart one for colored persons and the other for white, and such was the arrangement that on the down and up trips their places were reversed. The cars were alike comfortable, and in turn appropriated to the two races, but separately. A colored woman being excluded from one, and sent against her will to that assigned to her race, brought suit against the company, and recovered damages, the Court holding that the regulation separating the colored from the white passengers was illegal, and in answer to the railroad company's claim that so far from excluding this class of persons from the cars, they had provided accommodations for

them, said, "this is an ingenious attempt to evade compliance with the obvious meaning of the requirement," which was not merely that colored people should be allowed to ride, but that in the use of the cars there should be no discrimination because of their color. This providing separate cars was, therefore, a discrimination on account of color.

In *The West Chester and Philadelphia RR. Co.* v. *Miles* (1867), 55 Pa. 209, Judge AGNEW says:

> If a negro takes his seat beside a white man, or his wife or daughter, the law cannot repress the anger or Congress the aversion which some will feel. However unwise it may be to indulge the feeling, human infirmity is not always proof against it. * * To assert separateness is not to declare inferiority in either. It is not to declare one a slave and the other a freeman. That would be to draw the illogical sequence of inferiority from difference only. It is simply to say that, following the order of Divine Providence, human authority ought not to compel these widely-separated races to intermix. The right of such to be free from social contact is as clear as to be free from intermarriage. The former may be less repulsive as a condition, but not less entitled to protection as a right. When, therefore, we declare a right to maintain separate relations as far as is reasonably practicable, but in a spirit of kindness and charity, and with due regard to equality of rights, it is not prejudice, nor caste, nor injustice of any kind, but simply to suffer men to follow the law of races, established by the Creator himself, and not to compel them to intermix contrary to their instincts.

The Pennsylvania Act of March 22, 1867, provides:

> SECTION 1. *Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania in General Assembly met, and it is hereby enacted by the authority of the same*, That on and after the passage of this Act, any railroad or railway corporation, within this Commonwealth that shall exclude, or allow to be excluded, by their agents, conductors or employees, from any of their passenger cars any person or persons, on account of color or race, or that shall refuse to carry in any of their cars thus set apart, any person or persons on account of color or race, or that shall for such reason compel or attempt to compel any person or persons to occupy any particular part of any of their cars set apart for the accommodation of people as passengers, shall be liable, in an action of debt, to the person thereby injured or aggrieved in the sum of five hundred dollars: P. L. page 38.

Under this law, a railroad company was held liable for excluding a colored woman from a car where white persons were. This decision was made by a divided Court. The

case was ordered to be re-argued, and a decision was rendered in 1878, sustaining the same doctrine, that the railroad company could not exclude colored persons from a certain car where white people were: *Central Railroad of New Jersey* v. *Green and wife* (1878), 86 Pa. 421.

And in Louisiana, a discrimination cannot be made between white and black passengers. It is held that a common carrier may make reasonable rules and regulations for the government of the passengers on board his boat, but it cannot be pretended that a regulation which is founded on prejudice, and which is in violation of law, is reasonable. So when a colored woman is excluded from the ladies' cabin on a boat, because she is colored, she can recover damages under the law from the common carrier: *Decuire* v. *Benson* (1875), 27 La. Ann. 1. (WYLY, J., dissented).

The Tennessee Code provides that railroad companies may set apart separate cars for colored persons, provided:

2366. Accommodations equal in all respects in comfort and convenience to the first-class cars on the train, and subject to the same rules governing other first-class cars, shall be furnished them: Code of 1884, page 408.

Under this law a railroad company is not liable in damages to a mulatto passenger, who, having declined a seat in a coach free to persons of both sexes, regardless of race or color, and equal in all respects to any coach in the train, and having also refused to surrender her ticket unless admitted to a seat in another coach reserved exclusively for white ladies and their gentlemen attendants, quits the train, of her own accord, on being informed by the conductor of his purpose to eject her on account of her refusal to surrender her ticket: *Chesapeake, Ohio and South Western Railroad Company* v. *Wells* (1887), 85 Tenn. 613.

The Supreme Court of Tennessee does not seem satisfied with this decision, and in a subsequent case: *Memphis and Charleston Railroad Co.* v. *Benson* (1887), 85 Tenn. 627, modifies the language thus:

And that a regulation, assigning a particular car to persons of color, that car being in all respects equal in comfort to any other in the train, was reasonable.

No such rule appears in that case. This language was used in *Chesapeake, Ohio and South Western Railroad Company* v. *Wells*, *supra*, in describing the car:

> Persons of either sex were allowed in the front car without regard to color or race.

And the Court further tries to show authority by citing as cases in point: *West Chester and Philadelphia Railroad Co.* v. *Miles* (1867), 55 Pa. 209, and *Chicago and North Western Railroad Co.* v. *Williams* (1870), 55 Ill. 185. The fact is, that in *Chesapeake, Ohio and South Western Railroad Co.* v. *Wells* (1887), 85 Tenn. 613, there was no car set apart for the accommodation of the colored race, and there was a plain discrimination against the colored woman. However, when there is a car set apart for colored persons, of equal accommodations, it is generally sufficient, under the law of many States. It is held that equality of accommodations does not mean identity of accommodations, and it is not unreasonable, under certain circumstances, to separate white and colored passengers on a railway train, if attention is given to the requirement that all paying the same price shall have substantially the same comforts, privileges and pleasures furnished to others: *Logwood and wife* v. *Memphis and C. Railroad Co.* (1885), U. S. C. Ct. W. D. Tenn., 23 Fed. Repr. 318.

In *Murphy* v. *Western and A. RR. and others* (1885), U. S. C. Ct. E. D. Tenn., 23 Fed. Repr. 637, Judge KEY says:

> Again, I believe that where the races are numerous, a railroad may set apart certain cars to be occupied by white people, and certain other cars to be occupied by colored people, so as to avoid complaint and friction; but if the railroad charge the same fare to each race, it must furnish, substantially, like and equal accommodations.

So it has been held that on a night steamboat, plying on public navigable waters, colored female passengers may be assigned a different sleeping cabin from white passengers. But such a right to make such separation can only be upheld when the carrier, in good faith, furnishes accommodations equal in quality and convenience to both alike: *The Sue*

(1885), U. S. D. Ct. D. Md., 22 Fed. Repr. 843. In such a case, it is a matter which cannot be regulated by State law, and Congress, having refrained from legislation on the subject, the owners of the boat are left at liberty to adopt in reference thereto such reasonable regulations as the common law allows: *Hall* v. *Decuir* (1877), 5 Otto (95 U. S.) 490.

Louisiana has passed a statute requiring all railway companies carrying passengers to provide equal, but separate accommodations for the white and colored races, by providing separate coaches or compartments, so as to secure separate accommodations. It defines the duties of the officers of such railways, directing them to assign passengers to the coaches or compartments set aside for the use of the race to which such passengers belong. It authorizes the officers to refuse to carry on their trains such passengers as may refuse to occupy the coaches or compartments to which he or she is assigned, and to exonerate such railway companies from any and all blame or damages that may proceed or result from such refusal. Penalties are prescribed for both the officers of the railway companies, and the passengers who refuse to comply with the law. Street railroads are, however, specially exempt from the operations of the act: Act of July 10, 1890, Laws, page 152.

[Another view of this important subject of separate accommodations for colored people will shortly appear in this magazine.—ED.]

VIII.

RIGHT TO HOMESTEAD EXEMPTION.

The right of homestead exemption cannot be denied the negro citizen. Thus, the Homestead Act of Kentucky of 1886, excluding negroes from the benefit of homestead, is void under the Constitution of the United States, so far as it discriminates against the negro citizen: *Eubank* v. *Eubank* (1885), 7 Ky. Law Repr., page 295; *Custard and wife* v. *Poston and others* (1886), decided in the Court of Appeals of Kentucky, 1 S. W. Repr. 434. The negro citizen has the same right to a homestead as any other citizen; to ex-

clude him from this right would be a gross violation of the Fourteenth Amendment of the Federal Constitution.

IX.

SELECTION OF JURORS.

A State law confining the selection of jurors to white persons, is in contravention of the Fourteenth Amendment, because it denies to such citizens the equal protection of the laws, since the constitution of juries is a very essential part of the protection which the trial by jury is intended to secure. Hence, where the State statute secures to every white man the right of trial by jury selected from, and without discrimination against, his race, and at the same time permits or requires such discrimination against the colored man because of his race, the latter is not equally protected by law with the former: *Strauder* v. *West Virginia* (1879), 10 Otto (100 U. S.) 303. So the action of a State officer invested with the power to select jurors, excluding all colored persons from the list, is repugnant to the provisions of the Fourteenth Amendment. His act was ministerial, not judicial, and, although he derived his authority from the State, he was bound, in the discharge of that duty, to obey the Federal Constitution and the laws passed in pursuance thereof: *Ex parte Virginia* (1879), 10 Otto (100 U. S.) 339. But a colored man cannot have some portion of the jury composed of his own race as a right. A mixed jury in a particular case is not essential to the equal protection of the laws. In selecting a jury to pass upon the life, liberty, or property of a person, there shall be no exclusion of his race, and no discrimination against them, because of his color: *Virginia* v. *Rives* (1879), 10 Otto (100 U. S.) 313.

So the exclusion, because of their race and color, of citizens of African descent, from the grand jury that found, and the petit jury that was summoned to try, an indictment, if made by the jury commissioners, without authority from the Constitution and laws of the State, is a violation of the prisoner's rights, under the Constitution and laws of the United States, which the trial Court is bound to redress; and

the remedy for any failure in that respect is ultimately in the United States Supreme Court: *Neal* v. *Delaware* (1880), 13 Otto (103 U. S.) 370.

X.

THE RIGHT OF SUFFRAGE.

The right of suffrage cannot be limited to the white race. The adoption of the Fifteenth Amendment of the Federal Constitution rendered inoperative any provision existing at the time of the adoption, of a State Constitution, whereby the right of suffrage was limited to the white race: *Neal* v. *Delaware* (1880), 13 Otto (103 U. S.) 370; see *Citizens, their Rights and Immunities*, 27 AMERICAN LAW REGISTER, 539; *The Right of the Federal Courts to Punish Offenders Against the Ballot Box*, 29 Id. 337.

XI.

MISCEGENATION.

The State may pass laws prohibiting marriage between white persons and persons of African descent: *Scott* v. *State* (1869), 39 Ga. 321. Thus, the Revised Code of Georgia of 1882, § 1708, forever prohibits the marriage relation between white persons and persons of African descent, and declares such marriages null and void. Chief Justice BROWN says of this section:

> For myself, however, I do not hesitate to say, that it was dictated by wise statesmanship, and has a broad and solid foundation in enlightened policy, sustained by sound reason and common sense. The amalgamation of the races is not only unnatural, but is always productive of deplorable results: *Scott* v. *State* (1869), 39 Ga. 321.

Another section of the Georgia Revised Code of 1882 reads:

> § 1710. All marriages solemnized in another State by parties intending at the time to reside in this State, shall have the same legal consequences and effect as if solemnized in this State. Parties residing in this State cannot evade any of the provisions of its laws as to marriage by going into another State for the solemnization of the marriage ceremony.

To evade the laws of Georgia, in *State* v. *Tutty et al.* (1890), U. S. C. Ct. S. D. Ga., 41 Fed. Repr. 753, a white

man and a colored woman, who had been indicted in the State Court for fornication, and repaired to the District of Columbia and were married, immediately returning to Georgia, and thereupon attempted to remove into the United States Court the indictments pending against them; but the petition for removal was denied, and the indictments remanded to the Court of the State.

Where the statutory law is silent as to the effect of marriages between persons domiciled in the State, and who leave it with the purpose of solemnizing their marriage elsewhere, to evade such laws, but intending to return and live therein, the marriage may be upheld where the inhibition relates to form, ceremony, or qualifications depending on age or like condition. When, however, the marriage is inhibited by a positive policy of the State, as affecting the morals and good order of society, and leading to serious social evils, the marriage will be held void. Such a law does not infringe the National Constitution: *State* v. *Tutty* (1890), U. S. C. Ct. S. D. Ga., 41 Fed. Repr. 753. Judge SPEER, in the opinion of the Court, says:

> It is enough, for the purpose of its duty, for this Court to ascertain that by a legitimate and settled policy the State of Georgia has declared such marriages unlawful and void; for while, in this country, the home life of the people, their decency and their morality, on the bases of that vast social structure of liberty, and obedience to law, which excites the patriotic pride of our countrymen and the admiration of the world, and while these attributes of our citizenship should be cherished and protected by all in authority, and the creatures who defy them should be condemned by all, the courts, in their judicial functions, are rarely concerned with the policy of the laws which are made to protect the community.

Such a law is not an infraction of the Fourteenth Amendment of the Federal Constitution. Judge ERSKINE said:

> Nor, I apprehend, is marriage considered to be embraced within that clause of Section 10 of Article I of the national Constitution which prohibits the State from passing any law impairing the obligation of contracts: *Ex rel. Hobbs and Johnson* (1871), U. S. C. Ct. N. D. Ga., 1 Woods 537.

The same doctrine has been held in Virginia. In this State, all marriages between a white person and a negro are

absolutely void (Code of 1887, ch. 101, sec. 2252, page 560). To evade this statute, a negro man and a white woman, both domiciled in Virginia, went to the District of Columbia and were married according to the regular forms for celebrating marriages, and, in about ten days, returned to Virginia and lived as man and wife. Judge CHRISTIAN delivered the opinion of the Court, and held that although such marriages are not prohibited by the laws of the District of Columbia, and this marriage was performed according to the ceremonies there prescribed, it was void under the laws of Virginia, and the parties were liable to indictment. That while the forms and ceremonies of marriage are governed by the laws of the place where the marriage is celebrated, the essentials of the contract depend upon and are governed by the laws of the country where the parties are domiciled at the time of the marriage, and in which the matrimonial residence is contemplated: *Kinney* v. *Commonwealth* (1878), 30 Grat. (Va.) 858. This case holds that every country has a right to make laws regulating the marriage of its own subjects; to declare who may marry, how they may marry, and what shall be the legal consequences of their marriage. And it is held in Tennessee, that if the statutory prohibition is expressive of a decided State policy as a matter of morals, the courts must adjudge the marriage void as *contra bonos mores*. So a marriage between a white person and a negro, valid in Mississippi where celebrated, is void in Tennessee, in a case where the parties were domiciled in Mississippi at the time of the marriage: *State* v. *Bell* (1872), 7 Bax. (Tenn.) 9. So a citizen of Tennessee, prohibited by statute from marrying a certain person, cannot make the marriage valid by crossing over into a sister State, where such marriage is not inhibited, and then return at once to his domicile, having left for the purpose of evading the statute: *Pennegor* v. *State* (1889), 87 Tenn. 244.

The weight of authority is that if the parties, with intention to evade the law, go into a sister State and celebrate their marriage where it is not inhibited, and then return to

their domicile, the marriage is there void: *State* v. *Kennedy* (1877), 76 N. C. 251; *Williams* v. *Oates* (1845), 5 Ired. L. (N. C.) 535; *Dupre* v. *Bulard* (1855), 10 La. Ann. 411. But it has been held, contrary to the weight of authority, that if the parties had no intention of evading a statutory provision, and consequently no intent to return to the State of their former domicile, though the parties afterwards did return, the parties were held not guilty of fornication: *State* v. *Ross* (1877), 76 N. C. 242.

It was held that a marriage was valid in Massachusetts, though the parties left the State to avoid a statute, and were married in Rhode Island, and then immediately returned to their domicile: *Medway* v. *Needham* (1819), 16 Mass. 157; *Putnam* v. *Putnam* (1829), 8 Pick. (Mass.) 433; see also *Stevenson* v. *Gray*, *&c.* (1856), 17 B. Mon. (Ky.) 193. A later case in Massachusetts declares such marriages valid, unless the legislature has clearly enacted that such marriages out of the State shall have no validity: *Commonwealth* v. *Lane* (1873), 113 Mass. 458; and see *Brook* v. *Brook* (1861), 9 H. L. Cas. 219.

XII.

CHINESE.

Congress has limited the rights of the Chinese. On May 6, 1882, Congress enacted a law that no alien Chinese shall be naturalized and become a citizen of the United States (22 Stat. at Large, ch. 126, sec. 14, page 61). This law forbids the State and the United States Courts naturalizing Chinese. But a Chinese born of alien parents within the dominion and jurisdiction of the United States, who resides therein, and not engaged in any diplomatic official capacity, is a citizen of the United States: *In re Look Tin Sing* (1884), U. S. C. Ct. D. Cal., 21 Fed. Repr. 905. Before the act of Congress forbidding the naturalization of Chinese, it was held by one court that Chinese could not be admitted to citizenship: *Ah Kow* v. *Nunan* (1879), U. S. C. Ct. D. Cal., 5 Saw. 552.

In a revision of the statute of California, the word "white" was inadvertently omitted. This was amended by inserting the word "white." So from June 22, 1874, to February 18, 1875, Chinese in California were eligible to citizenship: *In re Ah Yup* (1878), U. S. C. Ct. D. Cal., 5 Saw. 155.

But the Chinese have certain rights in this country. Thus, a law discriminating against Chinese laborers, by forbidding contractors to employ them upon public works, is illegal and void: *Baker et al.* v. *The City of Portland* (1879), U. S. C. Ct. D. Ore., 5 Saw. 566.

The provisions of the additional articles to the treaty between the United States and China, of June 18, 1858, ratified and confirmed July 28, 1868, and proclaimed February 5, 1870, Articles V and VI (16 Stat. at Large, page 740), recognizing the rights of the citizens of China to emigrate to the United States for purposes of curiosity, trade, and permanent residence, and providing that Chinese subjects residing in the United States shall enjoy the same privileges, immunities, and exemptions in respect to travel and residence as may be enjoyed by citizens or subjects of the most favored nations, constitute a part of the supreme law of the land. Hence, a State law making it an offense for any officer, director or agent of a corporation to employ a Chinese, violates the treaty with China, and is void. It is also in conflict with the Fourteenth Amendment of the Federal Constitution, and is invalid. Chinese or Mongolians residing within the jurisdiction of a State are "persons" within the meaning of the term as used in the Fourteenth Amendment: *In re Tiburcio* v. *Parrott* (1880), U. S. C. Ct. D. Cal., 6 Saw. 349. Justice FIELD says in *Ah Kow* v. *Nunan* (1879), U. S. C. Ct. D. Cal., 5 Saw. 562:

> But in our country, hostile and discriminating legislation by a State against persons of any class, sect, creed, or nation, in whatever form it may be expressed, is forbidden by the Fourteenth Amendment of the Constitution. That Amendment, in its first section, declares who are citizens of the United States, and then enacts that no State shall make or enforce any law which shall abridge their privileges and immunities. It further declares that no State shall deprive *any person* (dropping the distinctive term *citizen*) of life, liberty, or property, without due process of

law, nor deny *to any person* the equal protection of the laws. This inhibition upon the State applies to all the instrumentalities and agencies employed in the administration of its government, to its executive, legislative, and judicial departments, and to the subordinate legislative bodies of counties and cities. And the equality of protection thus assured to every one whilst within the United States, from whatever country he may have come, or of whatever race or color he may be, implies not only that the courts of the country shall be open to him on the same terms as to all others for the security of his person or property, the prevention or redress of wrongs, and the enforcement of contracts, but that no charges or burdens shall be laid upon him which are not equally borne by others; and that in the administration of criminal justice he shall suffer for his offenses no greater or different punishment.

See also to the same effect the remarks of the same learned Judge in *In re Ah Fong* (1874), U. S. C. Ct. D. Cal., 3 Saw. 144.

So a State statute prohibiting all aliens incapable of becoming electors of the State, from fishing in the waters of the State, violates the Fourteenth Amendment of the Constitution of the United States. Thus, California by "An Act relating to fishing in the waters of this State," approved April 23, 1880, enacted as follows:

SECTION 1. All aliens incapable of becoming electors of this State are hereby prohibited from fishing, or taking any fish, lobsters, shrimps, or shell-fish of any kind, for the purpose of selling or giving to another person to sell. Every violation of the provisions of this Act shall be a misdemeanor, punishable upon conviction by a fine of not less than twenty-five dollars, or by imprisonment in the County Jail for a period of not less than thirty days: Laws of 1880, page 123.

This was held void as in contravention of the Fourteenth Amendment of the Constitution of the United States: *In re Ah Chong et als.* (1880), U. S. C. Ct. D. Cal., 6 Saw. 451. This Act was undoubtedly intended by its framers to apply only to Chinese, but the phraseology is such, that others than Chinese are included. By Article II of the California Constitution, the right of suffrage is limited to "male persons;" so that all alien women are "incapable of becoming electors," and being so, are within the terms of the Statute. So, also, under the Act to prohibit the issuance of licenses to aliens not eligible to become electors of the State of California, of April 12, 1880, it is provided:

SECTION 1. No license to transact any business or occupation shall be granted or issued by the State, or any county or city, or city and county or town, or any municipal corporation, to any alien not eligible to become an elector of this State: Laws of 1880, ch. 51, page 39.

So, under the terms of this Act, it is an offense to grant or issue a "license to transact any business or occupation" to any alien Caucasian woman. So a similar mistake is found in Article II of the California Constitution relating to the right of suffrage, in which it is provided "that no native of China * * shall ever exercise the privilege of an elector in this State." Many persons of the Caucasian race are natives of China, and would fall within the provisions of the State Constitution.

The City and County of San Francisco passed an ordinance arbitrarily regulating the laundry business. Yick Wo and a hundred and fifty others, all Chinese, were arrested for the violation of the ordinance. The ordinance was sustained by the State Supreme Court, and by the Circuit Court of the United States for the District of California. Yick Wo took his case to the United States Supreme Court on error from the Supreme Court of the State of California. Wo Lee took his case to the United States Supreme Court on appeal from the United States Circuit Court. The Supreme Court of the United States held that a municipal ordinance to regulate the carrying on of public laundries within the limits of the municipality, violates the provisions of the Constitution of the United States, if it confers upon the municipal authorities arbitrary power, at their own will, and without regard to discretion in the legal sense of the term, to give or withhold consent as to persons or places, without regard to the competency of the persons applying, or the propriety of the place selected for the carrying on of the business. An administration of a municipal ordinance for the carrying on of a lawful business within the corporate limits, violates the provisions of the Constitution of the United States, if it makes arbitrary and unjust discriminations, founded on differences of race, between persons otherwise in similar circumstances. In general, those subjects of

the Emperor of China who have the right temporarily or permanently to reside within the United States, are entitled to enjoy the protection guaranteed by the Constitution and afforded by the laws; that the guarantees contained in the Fourteenth Amendment of the Constitution extend to all persons within the territorial jurisdiction of the United States, without regard to differences of race, of color, or of nationality: *Yick Wo* v. *Hopkins* (1885), 118 U. S. 356.

By the treaty with China of November 17, 1880 (22 Stat. at Large, page 827) it is provided:

ART. II. Chinese subjects, whether proceeding to the United States as teachers, students, merchants, or from curiosity, together with their body and household servants, and Chinese laborers who are now in the United States, shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities, and exemptions which are accorded to the citizens and subjects of the most favored nations.

By the Act of July 5, 1884 (23 Stat. at Large, ch. 225, sec. 6, page 116), passed to execute this treaty, a certain certificate of identification from the Chinese government is required for the admission into the United States of "every Chinese person," other than a laborer, who may be entitled by said treaty to such admission. The Act of October 1, 1888 (25 Stat. at Large, ch. 1064, page 504), forbids the coming or return of Chinese laborers to the United States. On August 17, 1889 (Treasury Decision, 409), the Treasury Department held that the wife of a Chinese merchant who had never been in the United States, cannot be allowed to enter the United States, with or without her husband, otherwise than upon the production of the certificate required by Section 6 of the Act of July 5, 1884. But this decision does not accord with the doctrine of the courts, because the wife and children of a Chinese merchant, who is entitled, under Article II of the treaty of 1880, and Section 6 of the Act of 1884, to come within and dwell in the United States, are entitled to come into the country with him or after him, as such wife and children, without the certificate prescribed in said Section 6. Judge DEADY said in the late case of *In re*

Chung, Toy Ho and Wong Choy Sin (1890), U. S. C. Ct. D. Ore., 42 Fed. Repr. 398:

> Chinese women are not teachers, students, or merchants; and therefore they cannot, as such, obtain the certificate necessary to show they belong to the favored class. But, as the wives and children of teachers, students, and merchants, they do in fact belong to such class; and the proof of such relation with a person of this class, entitled to admission, is plenary evidence of such fact. * * It is impossible to believe that parties to this treaty [that of 1880], which permits the servants of a merchant to enter the country with him, ever contemplated the exclusion of his wife and children.

In re Tung Yeong (1884), U. S. D. Ct. D. Cal., 9 Saw. 620, it was decided that the minor children of Chinese merchants were entitled to admission into this country, either with the father or on being sent for by him, on the ground that they were not laborers. This decision was made February, 1884, while the Act requiring the production of a certificate from "every Chinese person" seeking to enter the United States was not passed until July 5, 1884, and, therefore, is not authority on the question whether the words "every Chinese person," in Section 6 of the act, are limited to teachers, students, and merchants, and do not include their wives and children. But it holds that the children of a Chinese merchant, under Article II of the treaty of 1880, are entitled to admission into the United States with their father, or after him, and on this principle the wife should be admitted.

The reason why the wife and children are not expressly mentioned in the Act, as entitled to admission, is found in the fact that the domicile of the wife and children is that of the husband and father. The Act conceding to the merchant the right to enter this country, and dwell therein at pleasure, includes his wife and minor children.

It will be seen by the acts of Congress, restrictions are applied to Chinese, not applicable to any other race; but these provisions do not contravene the Fourteenth Amendment of the Federal Constitution. Denying the Chinese the right of naturalization, and prohibiting certain classes of them from

coming into this country, is no infraction of the Federal Constitution.

XIII.

INDIANS.

Indians of the United States are not citizens. They are within the territorial limits of the United States, but are aliens. They constitute alien nations, distinct political communities, with whom the United States negotiate, as best suits the Government, either by treaty made by the President and Senate, or by act of Congress in the ordinary form of legislation. But general acts of Congress do not apply to them, unless so expressed as clearly to manifest an intention to include them: *Elk* v. *Wilkins* (1884), 112 U. S. 94; *Ex parte Crow Dog* (1883), 109 Id. 556. Though an Indian surrenders himself to the jurisdiction of the Federal Government, his surrender must be accepted before he will be recognized as a citizen: *Elk* v. *Wilkins* (1884), 112 U. S. 94. Indians cannot become citizens of the United States, even if they have separated themselves from their tribes and reside among white citizens of a State, if they have not been naturalized, or taxed, or recognized by the United States Government as citizens, or by any of the States as such.

In the case of *Elk* v. *Wilkins* (1884), 112 U. S. 94, Justices HARLAN and WOODS filed a dissenting opinion, holding that if an Indian was born in the United States, under the dominion and within the jurisdictional limits thereof, and had acquired a residence in one of the States, with the State's consent, and was subject to taxation and other duties imposed upon citizens, he thereby became a citizen under the provisions of the Fourteenth and Fifteenth Amendments of the Constitution of the United States. They held that:

> If he did not acquire national citizenship on abandoning his tribe and becoming, by residence in one of the States, subject to the complete jurisdiction of the United States, then the Fourteenth Amendment has wholly failed to accomplish, in respect to the Indian race, what, we think, was intended by it; and there is still in this country a despised and rejected class of persons with no nationality whatever; who, born in our territory, owing no allegiance to any foreign power, and subject, as residents of the

State, to all the burdens of government, are yet not members of any political community, nor entitled to any of the rights, privileges, or immunities of citizens of the United States.

D. H. PINGREY.

Bloomington, Ill.

Court of Appeals of New York, Second Division.

MARCUS M. BEEMAN *v.* GEORGE A. BANTA.

Upon breach of warranty of the quality of an article sold to be used for a particular purpose, the measure of damage is the profits that might have been made by using the article for such purpose if it had been as warranted.

Appeal from the General Term of the Fourth Department of the Supreme Court.

S. M. Coon, for appellant.
Charles G. Baldwin, for respondent.

PARKER, J., February 25, 1890. The recovery in this action was for damages claimed to have been sustained because of a breach of an express warranty on the part of the defendant to so construct a freezer for the plaintiff as that chickens could be kept therein in perfect condition. The jury have found the making of the warranty, its breach, and the amount of damages resulting therefrom. The General Term have affirmed these findings, and as there is some evidence to support each proposition, we have but to consider the exceptions taken. The appellant excepted to the charge of the Court respecting the measure of damages. Upon the trial he insisted, and still urges, that the proper measure of damages is the cost of so changing the freezer as to obviate the defect, and make it conform to the warranty. And *Milk Pan Co.* v. *Remington* (1888), 109 N. Y. 143, is cited in support of such contention. That decision was not intended to, nor does it, modify the rule as recognized and enforced in *Passinger* v. *Thorburn* (1866), 34 N. Y. 634; *White* v. *Miller* (1877), 71 Id. 133; *Wakeman* v. *Wheeler & Wilson*